IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 62

JACOB SENKO,

Petitioner,

vs.

LA CROSSE DREDGING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT.

PETITION FOR REHEARING.

STUART B. BRADLEY,
135 South La Salle Street,
Chicago 3, Illinois,

ROBERT BRODERICK,
322 First National Bank Bldg.,
East St. Louis, Illinois,
Attorneys for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 62.

JACOB SENKO,

Petitioner,

vs.

LA CROSSE DREDGING CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE STATE OF ILLINOIS, FOURTH DISTRICT.

PETITION FOR REHEARING.

Respondent prays that this Court grant rehearing of its majority opinion and order of February 25, 1957, which reversed the decision of the Fourth District Appellate Court of the State of Illinois. Despite the sound reasons which lie behind Rule 33, designed to restrict the scope of petitions of this kind, we feel constrained to file this Petition for Rehearing, for the following reasons:

REASONS FOR GRANTING REHEARING.

We respectfully submit that the effect of the majority opinion, if allowed to stand, would be to bring about confusion, fruitless and endless litigation and hardship among workers normally covered by compensation laws, and concurrent damage to their employers.

If this were just a matter of Jacob Senko's recovering $20,000, less legal expense, perhaps we should not presume upon this Court to reconsider. But thousands of other Jacob Senkos who work in labor gangs, on irrigation systems, conservation projects, levee jobs, dam construction and other earth-removing work will seek to abandon the lesser but surer compensation rights and, urged on by personal injury specialists, will make their pitch for recovery as seamen. Many workers, failing in proof of negligence or in proving jurisdiction, or involved in lengthy appeals in this highly questionable sphere of legal activities, will suffer hardship and loss of compensation, and at the same time will damage industry generally with a new flood of personal injury litigation. At best, the employee and employer will become involved in multiple proceedings, to the economic disadvantage of both industry and labor.

The grave public consequence of reversing the Appellate Court, we believe, was overlooked in the preparation of the majority opinion. If it were right, then, of course, the chips should fall where they will, but the majority opinion is built upon a series of suppositions, speculations and inferences that are directly contrary to the record in this case. There are substantial grounds not previously presented.

The majority opinion likens the dredge to a transoceanic liner, a member of whose crew would be subject to the Jones Act even though the vessel was never in transit during his employment aboard. So it is said that the connection of the dredge with the shore cannot be controlling. But *the record* shows that the dredge does not navigate, it *never* navigates, it never carries any personnel of its own if it is shifted to a new job; it would be towed by a towboat and the *towboat's crew* would be the crew which attends to its safety and its movement until it reaches a new job site.

The *majority opinion* states that "a normal inference" is that petitioner was responsible for seaworthiness of the dredge and that if the dredge leaked the jury "could suppose" that petitioner's job would be to repair the leak. The opinion says there is sufficient evidence in the record for the jury to decide that petitioner was "permanently attached" to the dredge as a member of its crew. That is directly contrary to *the record*, which shows that petitioner, as a member of the Laborers Union, could not be employed beyond the jurisdiction of his local. He had never worked on any vessel in all of his life; he had no knowledge or training to attend to seaworthiness of a vessel or of this dredge. As already mentioned, the laborers on a dredge job, such as petitioner, do not travel with this kind of a dredge if it is moved to a new site, so there is no permanent connection of the labor gang with the dredge. At a new site new labor would be employed from the local of the union having jurisdiction. The majority opinion by *supposition* confers a seaman's status on petitioner which *every fact* in evidence shows he did not have and which petitioner surely did not suspect he had, because he "didn't know what it was in the first place." (R. 168.) He made a stipulation, still unrevoked, that he was subject to the Illinois Workmen's Compensation Law for the purpose of receiving compensation.

The *majority opinion* states as one of the principal reasons for reversal was that petitioner "would have a significant navigational function when the dredge was put in transit." As we have pointed out, this man would not be aboard in any transit, never was aboard in transit, and the soundings were not for navigation but to determine how much soil had been dug. When Jacob Senko was asked about dredge movement, he said, "I don't know how they moved it." (R. 115.)

The opinion says further, "A normal inference is that petitioner was responsible for its [dredge] seaworthiness." Petitioner spent his life working as a coal miner and construction laborer. He had absolutely no experience with vessels and no training or experience in navigation. He was never on the Dredge "WILKINSON" or any boat or dredge when it was in motion. His travel on water was confined to moving 10 to 15 feet in a rowboat. (R. 116.) He knew nothing about the sea or when a vessel was seaworthy. No such "normal inference" as the Court refers to can be drawn from the record. It shows petitioner was a handyman and nothing more. The witness said:

> "Well, the deckhand or laborer, or whatever he is, he done the work around there and everything done on the shore he went and did it. (R. 17.)
>
> "Jake [Senko] would take the lanterns, go to the shore, go to the shore and get supplies. If they wanted something on the bank, some shovels or hammers or bars, whatever they needed, that's what Jake would do. (R. 17.)
>
> "Jake brought the water over. somebody wanted shovels on the bank, he would take the shovels over there." (R. 31.)

An inference that Senko was responsible for the vessel's seaworthiness could not be drawn from such testimony.

Although the opinion states (p. 3) that a witness testified "that a usual duty of one holding petitioner's job was to take soundings and clean navigation lights when the dredge was in transit," no such evidence appears in the record. The dredge was towed up the Mississippi River from Chester, Illinois, to the jobsite at Granite City, Illinois, by a commercial vessel. (R. 149.) This commercial vessel was manned by seamen, who signed on, lived aboard, took navigation soundings and performed seamen's duties, which may have included cleaning navigation lights. (R. 138, 139.)

Neither Senko nor any other laborer was on the dredge when it was so moved. Senko did not go on the jobsite on the dredge. He came on a labor permit from the Laborers Hall at Granite City, as did all the other laborers. If any laborers worked on the dredge at Chester, Illinois, they did not accompany it to Granite City. Senko was *never* on the dredge when it was moved. (R. 115.) The dredge had no navigation lights. (R. 150.) The only "soundings" Senko ever took were for the sole purpose of ascertaining how deep the dredge cut. (R. 114.)

The majority opinion says (p. 3), that

> "the jury could reasonably have believed 'Senko would clean navigation lights and take soundings' when this dredge was moved."

He had never done so. Every *fact* in evidence proves the contrary. The only conclusion the *record* permits is that when the dredge was towed to a new jobsite it would have no laborers or anyone else on board, the towing would be done, as it had been before, by a commercial vessel manned by seamen, and once the new jobsite was reached laborers would be recruited, as was Senko, from the nearest Laborers Hall.

The majority opinion reasons that the jury could have supposed Senko, at some future time, would have had navigational duties for respondent—(a) that he would have been on board when the dredge was in transit, and (b) if on board, would have taken soundings and performed other duties of navigation, and (c) consequently, he had a permanent connection with the dredge. Having thus assumed a seaman's status for Senko on a supposition of speculative duties which Senko might perform at a future time, the opinion concludes petitioner was a seaman when injured because he could not then lose a seaman's status which he might some day acquire, for the

reason the dredge was "at anchorage" when he was injured.

As the opinion states, the "Court does not normally sit to reexamine a finding of the type that was made below", but we urgently submit that having undertaken such reexamination, it should follow the facts of record and not the speculative supposition of a jury made in patent disregard thereof.

Another important reason why rehearing is required is to determine whether for purposes of the Jones Act a structure such as this dredge is a vessel. The court decisions are far reaching and inclusive as to what is a vessel, even down to small craft, so long as they provide "a means of transportation". That element is lacking with respect to this dredge. The federal statutory definition of a vessel in 1 U. S. C. A. 3 is:

> "§ 3. *'Vessel' as including all means of water transportation.* The word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." (R. S. § 3.)

As mentioned in a footnote to the majority opinion, no question was raised as to whether the dredge had the status of a vessel. That question should be considered and fully presented by brief and argument. Under the Jones Act, in order to be a "seaman" one must have duties pertaining to a vessel which can navigate. For the purpose of that Act, a dredge should not be a vessel, even though it might be such under other laws or for other purposes.

As has been pointed out more fully in the dissenting opinion of Mr. Justice Harlan, the petitioner met none of the requirements of having some connection with a ship's company; he was subject to the discipline and super-

vision not of officers of a vessel but of the labor foreman in charge of the construction project who worked on shore. His connection was not with a vessel but with a construction gang.

The majority opinion overlooks the fact that positive evidence as to the nature of seamen's duties on the western rivers was received and that the petitioner failed to meet the test on any conceivable basis. The jury returned a general verdict for the plaintiff, but this is not binding as to his status because no reasonable minds could differ as to his non-maritime status, which did not meet the requirements of the Jones Act. The evidence was insufficient to support the finding of the jury.

The social conscience has grown considerably in the past 40 years, and one of the most significant achievements of the State legislatures is found in the compensation acts. It has also been the desire of Congress to provide so far as possible compensation, regardless of negligence, for industrial accidents. Today, with good compensation laws, there is no need to stretch the other legislation to provide for workers such as petitioner. Even when it is stretched, it is not a real boon, as the men are faced with the need of proving negligence and will be confronted with the defense in many cases that compensation acts are not applicable. The employee would be in the dilemma of choosing from three possible routes, the employer the cost of defending three proceedings.

The majority opinion compounds the unfortunate legal fiascos which came from *Southern Pacific* v. *Jensen*, 244 U. S. 205, 37 S. Ct. 524; it adds one more large area of confusion to the already confused situation of amphibious workers, cf., *Davis* v. *Department of Labor*, 317 U. S. 249, 63 S. Ct. 255. This latest element of confusion should be corrected upon rehearing.

In order that we may do our part in helping to clarify the law, we pray that this Court grant a rehearing.

Respectfully submitted,

STUART B. BRADLEY,
135 South La Salle Street,
Chicago 3, Illinois,

ROBERT BRODERICK,
322 First National Bank Bldg.,
East St. Louis, Illinois,
Attorneys for Respondent.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

.....

STUART B. BRADLEY.

PROOF OF SERVICE.

I, STUART B. BRADLEY, one of the attorneys for LaCrosse Dredging Corporation, respondent herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 20th day of March, 1957, I served copies of the foregoing Petition for Rehearing on Jacob Senko, Petitioner herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to his respective attorneys of record, as follows:

Stanley M. Rosenblum, Esq.,
405 Olive Street,
St. Louis 2, Missouri; and

Messrs. George J. Moran and William J. Beatty,
1930 State Street,
Granite City, Illinois.

.....

STUART B. BRADLEY.

Subscribed and sworn to before me this 20th day of March, 1957.

.....

Notary Public.